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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. KENNETH G. DOZIER, Defendant and Appellant.	B115370 (Super. Ct. No. BA143017)
THE PEOPLE, Plaintiff and Respondent, v. KENNETH G. DOZIER, Defendant and Appellant.	B115593 (Super. Ct. No. A983129

Consolidated APPEALS from a judgment and order after judgment of the Superior Court of Los Angeles County. L. Jeffrey Wiatt and Jacqueline Connor, Judges. Judgment in BA143017 affirmed as modified. Order after judgment in A983129 affirmed.

Carla DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Marc E. Turchin, Supervising Deputy Attorney General, and Douglas L. Wilson, Deputy Attorney General, for Plaintiff and Respondent.

Defendant appeals from the judgment following his convictions for attempted premeditated murder and being a felon in possession of a firearm. The principal issue in this appeal is the correct method of calculating the minimum term of the indeterminate life sentence for a "third strike" offender when the punishment otherwise provided for the current offense is life imprisonment with possibility of parole. (Pen. Code, §§ 664, subd. (a), 667, subd. (e)(2)(A).)[1]

In our prior opinion, we held the trial court must select the minimum term of the indeterminate life sentence from the options provided in section 667, subdivision (e)(2)(A)(ii) [25 years] or (iii) [as relevant here, the period prescribed by section 3046]. The Supreme Court granted review of our opinion and subsequently remanded the cause to us for reconsideration in light of *People* v. *Jefferson* (1999) 21 Cal.4th 86. *Jefferson* involved the calculation of "the minimum term" for a *second strike* offender when the punishment otherwise provided for the current offense is life imprisonment with possibility of parole. (§§ 664, subd. (a), 667, subd. (e)(1).)

In the published portion of this opinion we review the calculation of the minimum term for third strike offenders in light of *Jefferson*. We conclude our prior opinion was correct and if anything *Jefferson* supports our original analysis.

In the unpublished portion of this opinion we address the remaining issues in defendant's appeal. We also address his appeal from an order in a separate case denying his motion to vacate the judgment in that case on the ground his guilty pleas were involuntarily obtained. We modify the sentence on the attempted murder conviction and otherwise affirm the judgment in BA143017. We affirm the order after judgment in A983129.

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[*] Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication only as to the introduction, statement of facts and Part VIII.

[1] All statutory references are to the Penal Code unless otherwise specified.

FACTS AND PROCEEDINGS BELOW

Roland Edwards had just finished making a call from an outdoor pay telephone when he was approached by defendant Kenneth Dozier and two other men. One of the men tried to grab a diamond ring off Edwards's finger. The man then said to Edwards: "This is Eight-Trey, nigger, what set are you from?" Edwards replied he was not from any "set" and did not "gangbang."[2] The man then walked away. Edwards believed the encounter was over when suddenly defendant appeared next to him and stuck a pistol against his head "execution style." Defendant said, "Fuck Five-Deuce," fired a shot into Edwards's head, and ran.

Edwards survived. He identified defendant as his assailant from a photographic lineup and at trial. Asked whether he had any doubt defendant was the person who shot him, Edwards answered, "Nope, I don't have any doubt in my mind at all. That's one face that I will never forget." Edwards was sure of his identification because although the attack occurred at night the area around the telephone booth was well lit, he had a close look at the man who shot him and because the shooter had a distinctive tear-drop shaped mark below one eye. (Defendant has such a mark below his right eye.)

Edwards's identification testimony was supported by the testimony of an eyewitness to the shooting, Aaron Rodgers. Rodgers saw defendant and another man jump over a fence near the telephone booth Edwards was using. He saw the men talking to Edwards and heard someone say, "Fuck him." Next, he saw defendant put a gun against Edwards's head and fire it. Defendant and the other man jumped back over the fence and ran. Rodgers was able to identify defendant as the shooter because he recognized him. Defendant had frequented a nearby night club when Rodgers worked there as a security guard and Rodgers had noticed the tear-drop mark on defendant's

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[2] Aaron Rodgers, a witness to the shooting, testified Edwards replied he was from "'52nd Street Crip.'"

cheek. The day after the shooting, Rodgers went to the police and told them it was defendant who had committed the crime. He also selected defendant's picture from among 44 photographs the police showed him.

The defense case was based on misidentification and alibi. In order to raise a reasonable doubt as to his identification as the shooter, defendant sought to introduce expert testimony on factors which may make eyewitness testimony unreliable. Following a hearing on the admissibility of this evidence, the trial judge exercised his discretion to exclude it.

The court also refused to allow the defense to impeach the victim, Edwards, with evidence he was convicted of assault with a deadly weapon in 1981.

The jury found defendant guilty of attempted willful, deliberate, premeditated murder (Pen. Code, §§ 187, 664) and found he had personally used a firearm in committing the offense and personally inflicted great bodily injury upon the victim. The jury also found defendant guilty of possession of a firearm by a felon based on its verdict on the attempted murder count and defendant's stipulation to a prior felony conviction.

The information in this case alleged, for purposes of the "three strikes" law, (§§ 667, subds. (b)-(i)), that in 1989 defendant had suffered three prior convictions for serious or violent felonies. All three convictions resulted from defendant's guilty pleas in one case.

Before the trial on the current offenses defendant moved the court in which the trial was scheduled for an order striking the prior conviction allegations on the ground his guilty pleas were unconstitutionally obtained because the prosecutor incorrectly advised him of the sentencing consequences should he go to trial and be convicted. When this motion was denied, defendant moved the court which took his guilty pleas to vacate its judgment on the same constitutional ground. That motion was also denied.

In sentencing defendant, the trial court rejected his request it strike the three prior conviction allegations "in the interests of justice." (§ 667, subd. (f)(2).) The court

imposed a term of life with possibility of parole for the willful, deliberate, premeditated attempted murder conviction (§ 664, subd. (a)) and, under the "three strikes" law, ordered the minimum parole eligibility period tripled. The court also imposed a consecutive "three strikes" sentence of 25 years to life on the defendant for being a felon in possession of a firearm. In addition, the court imposed a total of 19 years for various enhancements to run consecutively to the sentence for attempted murder.

Defendant filed a timely appeal from this judgment challenging his convictions, the denial of his motion to strike the priors and the sentence imposed on the attempted murder count. He filed a separate appeal from the order denying his motion to vacate the judgment in the 1989 case. We ordered the two appeals consolidated. For the reasons stated below, we modify the sentence on the attempted murder conviction to 25 years to life. In all other respects the judgment and order are affirmed.

DISCUSSION

I. UNDER THE CIRCUMSTANCES OF THIS CASE, THE TRIAL COURT PROPERLY EXCLUDED EXPERT TESTIMONY ON THE UNRELIABILITY OF EYEWITNESS IDENTIFICATION.

In *People* v. *McDonald* (1984) 37 Cal.3d 351, our Supreme Court recognized that in an appropriate case the defendant should be permitted to present expert testimony on factors which may make eyewitness identification unreliable. The court provided the following guidance on when such testimony should be admitted.

> "[T]he decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion[.] . . . Yet deference is not abdication. When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the

> defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*Id.* at p. 377.)

Defendant contends the trial court abused its discretion in disallowing such expert testimony in this case because: eyewitness identification was not only a key element, it was the *only* element of the prosecution's case, the eyewitness testimony was not substantially corroborated by independent evidence and the proffered witness was qualified to testify to the psychological processes which, on occasion, lead to mistaken identification. He further contends the trial court's abuse of discretion was of constitutional proportion because it denied him the opportunity to present a defense in violation of his Sixth and Fourteenth Amendment rights.

We agree with defendant's analysis up to a point. The eyewitness identification testimony was the only evidence which could support defendant's conviction of attempted murder and being a felon in possession of a firearm. While there was independent evidence placing defendant at the scene of the crime, the People produced no other evidence to show it was defendant who shot Edwards nor did the People rely on an aider and abettor theory.

The People did not challenge the qualifications of defendant's expert.

Defendant's analysis breaks down, however, when it comes to the issue of corroboration.

Edwards's eyewitness identification, it will be recalled, was corroborated by Rodgers's eyewitness identification. Whether two eyewitnesses corroborating each others' testimony satisfies *McDonald*'s requirement of independent reliability depends on the circumstances of the identifications. In *McDonald*, for example, *seven* eyewitnesses corroborating each others' testimony was insufficient. (37 Cal.3d at pp. 355-359, 375-376.) However, in the case of each witness there were elements which could have raised

reasonable doubts in the jurors' minds about the accuracy of the identifications even without their being privy to the specialized knowledge of an expert on eyewitness identification. (*Ibid*.) Here, the only element which might have raised a reasonable doubt about the accuracy of the identifications, based on lay knowledge, was the fact Edwards and Rodgers gave conflicting testimony as to whether the tear-drop mark was on the shooter's left cheek or his right cheek. Unlike the eyewitnesses in *McDonald*, Edwards and Rodgers had a close, clear, unobstructed view of the shooter for a substantial period of time on a well lit street. Furthermore, unlike the eyewitnesses in *McDonald*, Rodgers was acquainted with the shooter having seen him on three or four previous occasions while working as a night club security guard in the vicinity of the shooting. In our view, the circumstances under which the identifications were made and the fact the corroborating witness had a prior relationship with the defendant provided the necessary independent reliability to the testimony. (See Comment, Admission of Expert Testimony on Eyewitness Identification (1985) 73 Cal. L. Rev. 1402, 1423, & fn. 140.)

Defendant contends Rodgers's identification was unreliable precisely *because* he was familiar with defendant and defendant's facial features. He argues on appeal his expert would have explained to the jury the phenomenon known as "unconscious transfer" in which a witness transfers information from a previous stored-away memory onto what he believes he saw in the current observation. The expert would have testified this phenomenon is more likely to occur when the witness is familiar with the person being transferred to the current observation especially if the witness has seen the person in the same surroundings as those in which the witness is making the current observation. (See *People* v. *Fudge* (1994) 7 Cal.4th 1075, 1111, & fn. 9.)

The problem with this argument is that it is not supported by the record. The proposed expert testimony was offered only with respect to the eyewitness testimony of Edwards. Defense counsel made no mention of using testimony about "unconscious transfer" to undermine Rodgers' testimony. Indeed, in opposing admission of the

expert's testimony, the prosecutor pointed out the defense had not asserted the evidence the eyewitness identification expert supplied would be germane to Rodgers's testimony. Defense counsel did not respond to this point.

Applying the standards set out in *McDonald* to the circumstances of this case, we hold the trial court did not abuse its discretion in excluding the defense expert's testimony.

Defendant's contention the exclusion of this evidence unconstitutionally interfered with his right to present a defense does not alter our view.[3] "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. . . . As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials" so long as those rules are not "arbitrary" or "disproportionate to the purposes they are designed to serve." (*U.S.* v. *Scheffer* (1998) ___ U.S. ___, 118 S.Ct. 1261, 1264.) The rule giving the trial court discretion to exclude expert testimony is neither arbitrary nor disproportionate to the purposes it is designed to serve when the standards announced in *McDonald* are applied, as they were in this case. Moreover, the exclusion of this evidence did not significantly undermine the accused's defense. Even assuming that as a result of the expert's testimony the jury disregarded Edwards's identification of the defendant there would remain the even more compelling and untainted eyewitness identification by Rodgers who recognized defendant from previous encounters. Defendant was able to weaken Edwards's and Rodgers's testimony by pointing to their inconsistent statements about the

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[3] The People argue defendant cannot claim his constitutional rights were violated by exclusion of the expert testimony because he did not object specifically on constitutional grounds below. There is no merit to this argument. A party is not required to object to the exclusion of his own proffered evidence. A judgment may be reversed if the exclusion was erroneous, resulted in a miscarriage of justice, and "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code, § 354.) Defense counsel's offer of proof in the trial court was sufficient to preserve the issue on appeal.

location of the mark on defendant's cheek and defendant was allowed to present his alibi evidence which would have exonerated him if the jury had believed it.

II. THE TRIAL COURT PROPERLY REFUSED TO ALLOW DEFENDANT TO IMPEACH THE VICTIM'S TESTIMONY WITH A SIXTEEN YEAR OLD FELONY CONVICTION FOR ASSAULT WITH A DEADLY WEAPON.

In 1981 Edwards was convicted of one count of assault with a deadly weapon. Defendant sought to introduce evidence of that conviction to impeach Edward's testimony in this case. The trial court correctly disallowed the evidence.

In *People* v. *Burns* (1987) 189 Cal.App.3d 734, we examined the use of a witness's prior felony conviction for purposes of impeachment in light of our Supreme Court's decision in *People* v. *Castro* (1985) 38 Cal.3d 301. We noted *Castro* had concluded that, subject to the provisions of Evidence Code section 352, the California Constitution "'authorizes the use of any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty.'" (*People* v. *Burns*, *supra*, 189 Cal.App.3d at p. 737.) We further noted as a result of this interpretation the law "no longer compels the trial court to exclude evidence of a prior conviction relevant to credibility solely because of its remoteness in time." (*Ibid*.)

Our opinion went on to observe, however: "There is nothing in *Castro* . . . to indicate remoteness is no longer a factor to be considered by the trial court in exercising its discretion under Evidence Code section 352. . . . Indeed, if the trial court is to exercise discretion over the admissibility of crimes involving moral turpitude, remoteness of the conviction is an obvious subject of consideration." (189 Cal.App.3d at p. 737.)[4] We

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[4] Defendant quotes language from *People* v. *Halsey* (1993) 21 Cal.App.4th 325, 328 implying remoteness is not a factor in considering the admissibility of a prior conviction to impeach a witness. This language is taken out of context and the view attributed to the *Halsey* court does not reflect the law of this state.

identified a number of factors the trial court should consider in determining whether a prior conviction should be excluded because of its remoteness including the length of time which has elapsed since the conviction, the length of the sentence served, the nature of the conviction, the age of the witness at the time the crime was committed and the witness's conduct subsequent to the conviction. (*Id.* at p. 738.)

Assault with a deadly weapon is a crime involving moral turpitude. (*People* v. *Thomas* (1988) 206 Cal.App.3d 689.) Nevertheless, applying the factors in *Burns*, it is clear the trial court properly excluded evidence of Edwards's conviction as too remote to be of use in determining his present credibility. The conviction occurred 16 years before the current incident. Edwards was placed on probation and served no prison time. Although assault with a deadly weapon is a crime of moral turpitude it is of only slight probative value in judging the witness's credibility. Edwards was only 20 years old at the time of the conviction and has suffered no subsequent convictions.

For the reasons stated above, we conclude the trial court properly excluded evidence of Edwards's prior conviction for purposes of impeachment.

III. DEFENDANT DID NOT OBJECT TO THE TESTIMONY REFERRING TO GANGS AND, IN ANY EVENT, THE EVIDENCE WAS ADMISSIBLE.

Defendant maintains the trial court erred in allowing Edwards and Rodgers to refer to statements made in gang jargon by defendant, the man who was with him and the victim, Edwards. These statements, referring to particular gangs and "gangbanging," were irrelevant because the People were not seeking a street gang enhancement and were highly prejudicial because they suggested defendant was a gang member.

Because defendant did not object to this testimony the issue of its admissibility was waived for purposes of appeal. In any event, evidence Edwards was in the territory of the Eight-Trey Hoover Crips and defendant believed him to be a member of the Five-Deuce Crips was relevant to show the motive for the shooting. The parties stipulated the

two gangs were enemies and their members had been known to kill one another. (See *People* v. *Ruiz* (1998) 62 Cal.App.4th 234, 239-240 [evidence of gang membership relevant to motive].)

IV. EVEN IF DEFENDANT WAS ADVISED INCORRECTLY AS TO THE PENAL CONSEQUENCES OF HIS GUILTY PLEAS TO PRIOR OFFENSES, HE DID NOT MAKE A SUFFICIENT SHOWING THIS INCORRECT ADVICE AFFECTED HIS PLEAS.

In 1989 defendant pleaded guilty to one count of shooting at an inhabited dwelling and two counts of robbery. Prior to entering those pleas, defendant was informed by the prosecutor that should he go to trial and be convicted on all three counts he faced a maximum prison term of 11 years, 4 months. But, the prosecutor told defendant, if he pleaded guilty to the three counts the court was willing to impose a total sentence of 7 years.

Defendant now maintains the prosecutor's advice was incorrect and the maximum sentence he could have received if convicted on all three counts was only nine years, eight months. Had he known the truth about his sentencing exposure, defendant contends he would have chosen to go to trial rather than accept the plea bargain.

Defendant made a motion in the court trying the current offenses to vacate the prior convictions as having been obtained involuntarily. When that motion was denied, he made the same motion before the court which took his guilty pleas in 1989. The motion was again denied. Defendant appeals the denial of the first motion as part of his appeal from the current convictions. He filed a separate appeal from the denial of the motion brought before the court which took the guilty pleas. We affirm both rulings for the same reason: even assuming his guilty pleas were tainted by incorrect advice as to the penal consequences of those pleas, defendant has failed to establish prejudice, i.e., had he been advised correctly he would not have pleaded guilty to the three offenses.

The People do not dispute defendant's contention the prosecutor miscalculated the maximum sentence defendant could have received had he gone to trial and been convicted on all three counts. The People contend instead defendant is procedurally barred from attacking the validity of his plea bargain and he has failed to show he would not have accepted the plea bargain had he been correctly informed of the maximum sentence. We need not address the procedural aspects of an attempt to vacate a sentence or withdraw a plea of guilty on the ground of misadvisement as to its consequences. Defendant's failure to establish prejudice is a sufficient basis to affirm the trial courts' rulings on both motions.

As our Supreme Court explained in *People* v. *Edelbacher* (1989) 47 Cal.3d983, 1031, "the requirement that an accused be advised of the consequences of the plea is not constitutionally compelled and failure to advise as to consequences constitutes error which requires that the plea be set aside only if prejudice is demonstrated. [Citations omitted.]" To establish prejudice resulting from a misadvisement of the consequences of a guilty plea, the defendant must show he would not have entered the plea had he been given a proper advisement. (*People* v. *McClellan* (1993) 6 Cal.4th 367, 377.)

In his collateral attack on the convictions made in the court trying the present charges defendant made no showing of prejudice whatsoever. He now argues the transcript of the plea bargain shows he entered the pleas "reluctantly," but the reporter's transcript of the plea bargain does not support even that weak argument.

In his subsequent attack on the convictions in the court where the pleas were entered defendant added a declaration stating that at the time he pled guilty he was advised he was facing a maximum sentence of 11 years, 4 months and "had I known that my actual exposure was only 9 years and 8 months, I would not have accepted the plea bargain for 7 years." A defendant's self-serving statement, after conviction and sentencing, that with correct advice he would not have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice.

The statement must be corroborated independently by objective evidence. (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.) Nothing in the record of the plea bargain nor any extrinsic evidence presented on the motion provides corroboration for defendant's claim.

V. DEFENDANT IS NOT ENTITLED TO A STAY OF HIS SENTENCE ON HIS CONVICTION FOR BEING A FELON IN POSSESSION OF A FIREARM.

The trial court ordered defendant to serve a "three strikes" sentence of 25 years to life on his conviction for being a felon in possession of a firearm. Defendant argues the court should have stayed this sentence under section 654 on the theory his possession of the gun was merely incidental to his main objective: to shoot Edwards. (Cf. *People* v. *Venegas* (1970) 10 Cal.App.3d 814, 821.)

Whether the defendant acted with a singular intent and objective is a question of fact for the trial court and the court's finding will not be disturbed if it is supported by substantial evidence. (*People* v. *Avalos* (1996) 47 Cal.App.4th 1569, 1583.)

As the court observed in *People* v. *Ratcliff* (1990) 223 Cal.App.3d 1401, 1410, "[a] violation of section 12021, subdivision (a) is a relatively simple crime to commit: an ex-felon who owns, possesses, or has custody or control of a firearm commits a felony." Because a violation of section 12021 is committed the instant the felon has control of a firearm, section 654 normally does not bar separate punishment for this offense and another offense in which the firearm is used.

In the present case, Rodgers testified defendant approached Edwards, who was a stranger to defendant, and asked him where he was from. When Edwards answered "Five Deuce," defendant "pulled out a gun and shot him in the head." From this evidence the trial court could reasonably find: (1) defendant did not arm himself with the specific intent to hunt down and shoot Edwards and (2) defendant was already armed when he encountered Edwards. There is simply no evidence to support defense counsel's speculation one of the men accompanying defendant handed him the gun just moments

before he shot Edwards. On the contrary, Rodgers testified defendant "*pulled out* a gun," indicating the gun was already in defendant's possession when he approached the victim.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO STRIKE THE PRIOR SERIOUS FELONY ALLEGATIONS.

Prior to trial and again prior to sentencing defendant requested the trial court to exercise its discretion to strike his three prior serious felony convictions so he would not be sentenced as a "three strikes" defendant. (See *People* v. *Superior Court (Romero)* (1996) 13 Cal.4th 497.) The trial court denied this request both times. In each instance the court based its denial on defendant's past criminal record and the violent nature of the principal offense in the present case.

Initially we note there is a serious question as to whether the trial court's refusal to exercise its discretion to strike a prior serious felony allegation is reviewable on appeal. In *People* v. *Benevides* (1998) 64 Cal.App.4th 728, the court reasoned that because the defendant has no legal right to make a motion to strike a prior under section 1385, but may only request or suggest the trial court do so[5] he or she cannot "appeal" from the trial court's refusal to grant the request. Appellate review is only available if the trial court's refusal to dismiss a strike is based on the mistaken belief it has no discretion to do so or if the trial court expresses a clearly improper reason for refusing to exercise its discretion such as racial or religious bias. (*Id.* at pp. 734-735.)

Even assuming the trial court's refusal to strike a prior conviction allegation may be reviewed on appeal for abuse of discretion, we find no such abuse in the present case.

In *People* v. *Williams* (1998) 17 Cal.4th 148, 161, our Supreme Court stated when a trial court is considering whether to strike a prior serious or violent felony conviction allegation in a "three strikes" case the question is "whether in light of the nature and

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[5] Under section 1385 the power to dismiss a prior conviction allegation may be exercised only upon the trial court's own motion or the motion of the People.

circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character and prospects, the defendant may be deemed outside the [law's] spirit, in whole or in part . . . ."

Imposing a 25-to-life term for being a felon in possession of a firearm is not outside the "spirit" of the "three strikes" law especially when the firearm was used by the defendant to attempt to murder a perfect stranger with an "execution style" shot to the head.

As to his criminal record and background, defendant's probation report shows he has been committing violent crimes since the age of 13 when he was found to have committed an assault with a deadly weapon while in possession of a knife on a school ground. At age 15 he was convicted of robbery and at age 19 he was convicted of the three felonies which resulted in his "three strikes" sentence: two robberies and shooting at an occupied dwelling.

Far from being outside the spirit of the "three strikes" law, defendant is precisely the type of recidivist offender the law was intended to reach.

VII. DEFENDANT'S SENTENCE DOES NOT CONSTITUTE CRUEL OR UNUSUAL PUNISHMENT.

Defendant contends his total sentence amounts to life in prison without possibility of parole and this is "grossly, shockingly, horrifically disproportionate to his crime." Such hyperbole is unwarranted especially under the circumstances revealed by the record in this case. This case is clearly among those in which the offenses and the offender pose a high degree of danger to society. (*People* v. *Dillon* (1983) 34 Cal.3d 441, 479.)

Defendant has been committing violent crimes or serving time for them since he was 13. No previous sentence deterred him. We cannot say the punishment he now faces "offends fundamental notions of human dignity or . . . shocks the conscience." (*People* v. *Kinsey* (1995) 40 Cal.App.4th 1621, 1631.)

VIII. CALCULATION OF A "THIRD STRIKE" SENTENCE WHEN THE PUNISHMENT OTHERWISE PROVIDED FOR THE OFFENSE IS STRAIGHT LIFE WITH NO MINIMUM TERM.

In sentencing defendant on his conviction for willful, deliberate, premeditated attempted murder, the trial court pronounced: "The defendant will be sentenced to life in prison. Because this is a three strikes case, the court will triple the minimum parole eligibility under 3046 of the Penal Code for 21 years." Both the defendant and the People contend this sentence is incorrect. We agree. For the reasons explained below the correct sentence under the circumstances of this case is 25 years to life.

A. Statutory Background[6]

As an aid to understanding where the trial court went wrong in its sentencing and how the sentence properly should be calculated we set forth the relevant statutes below.

Section 667, subdivision (e)(1) provides that if a defendant has one prior conviction for a serious or violent felony: "[T]he determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction."

Section 667, subdivision (e)(2)(A) provides that if a defendant has two or more prior convictions for serious or violent felonies: "[T]he term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions. [¶] (ii) Imprisonment in the state prison for 25 years. [¶] (iii) The term determined by the court pursuant to Section 1170 for the underlying conviction . . . or any period prescribed by Section 190 or 3046."

Section 664, subdivision (a) provides a person found guilty of willful, deliberate and premeditated attempted murder "shall be punished by imprisonment in the state prison for life with the possibility of parole."

Section 3046 provides in relevant part: "No prisoner imprisoned under a life sentence may be paroled until he or she has served at least seven calendar years or has served a term as established pursuant to any other section of law that establishes a minimum period of confinement under a life sentence before eligibility for parole, whichever is greater. Where two or more life sentences are ordered to run consecutively to each other pursuant to section 669, no prisoner so imprisoned may be paroled until he or she has served at least seven calendar years, or has served a term as established pursuant to any other section of law that establishes a minimum period of confinement under a life sentence before eligibility for parole, on each of the life sentences which are ordered to run consecutively, whichever is greater.

B. The Trial Court Erred In Calculating The Sentence on Count I (Premeditated Attempted Murder).

When it sentenced defendant on Count I, premeditated attempted murder, the trial court imposed a term of life imprisonment with possibility of parole as provided in section 664, subdivision (a) but added the qualification that "[b]ecause this is a three strikes case, the court will triple the minimum parole eligibility under 3046 of the Penal Code for 21 years." In so doing, the court created a hybrid sentence containing elements of the sentence for a second strike offender (§ 667, subd. (e)(1)) and for a third strike offender (§ 667, subd. (e)(2)).

In *People* v. *Jefferson*, *supra*, our Supreme Court held that in sentencing a *second strike* offender on an offense such as attempted premeditated murder, which has no

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6 For purposes of this case there is no material difference between the legislative version of the "three strikes" law, section 667, subdivisions (b)-(i) and the initiative version, section 1170.12. We will refer to the legislative version.

specified minimum term to double, the minimum term of confinement under section 3046 serves as the "minimum term for an indeterminate term" which is doubled to produce the "second strike" sentence under section 667, subdivision (e)(1). (21 Cal.4th at pp. 90, 96.)

While the "three strikes" law essentially provides for doubling the sentence of a "second strike" offender it does not provide for simply tripling the sentence of a "third strike" offender. (See § 667, subd. (e)(2)(A), quoted above.) Yet, this appears to be what the trial court did in this case. The court imposed the indeterminate life term for premeditated attempted murder under section 664, subdivision (a) and, because that life term has no specified minimum term, the court created one by adopting the 7-year minimum parole eligibility period under section 3064 as the minimum term which it then tripled, resulting in a sentence of 21 years to life. In other words, the court imposed on a third strike defendant the sentence for a second strike defendant but tripled, instead of doubled, the "minimum term" of the indeterminate life term. (Cf. *People* v. *Jefferson*, *supra*, 21 Cal.4th at pp. 90, 96.)

The sentence imposed by the trial court in the present case, 21 years to life, was obviously wrong because the minimum term of the indeterminate life sentence imposed on a third strike defendant can never be *less* than 25 years. (§ 667, subd. (e)(2)(A)(i), (ii), (iii).)

C. The Proper Calculation of a Third Strike Sentence When the Defendant Would Otherwise Be Punished by a Life Sentence With Possibility of Parole.

The sentence for a third strike defendant "shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of [one of three options]." (§ 667, subd. (e)(2)(A).) Option one is "three times the term otherwise provided as punishment" for the current conviction. (§ 667, subd. (e)(2)(A)(i).) Option two is "twenty-five years." (§ 667, subd. (e)(2)(A)(ii).) Option three is "the term determined by the court pursuant to Section 1170 for the underlying

conviction . . . or any period prescribed by Section 190 or 3046. (§ 667, subd. (e)(2)(A)(iii).) Thus, the sentence for a third strike defendant is "*x* years to life" with *x* representing the minimum term of the life sentence under option one, two or three, whichever is greater.

A problem arises in calculating the minimum term under option one when, as in the present case, "the term otherwise provided as punishment" for the current offense is a straight life sentence with no specified minimum term. If the term "otherwise provided" is straight life then, under a literal reading of option one, "three times the term otherwise provided" would be three life sentences. While this would produce the longest sentence of the three options in section 667, subdivision (e)(2)(A) it would also produce an absurd result: the "minimum term" of the indeterminate life sentence is greater than the indeterminate life sentence itself.

It is apparent, however, the Legislature did not intend such a result because it addressed the problem of the straight life sentence in option three. That option provides the minimum term of the indeterminate life sentence established by subdivision (e)(2)(A) may be "any period prescribed by Section . . . 3046." (§ 667, subd. (e)(2)(A)(iii).) Section 3046 provides minimum parole eligibility periods for defendants convicted of offenses carrying a life sentence with possibility of parole. If the Legislature had intended to triple indeterminate life terms under option one it would not have made specific reference to section 3046 in option three because a triple life sentence under option one would always be a greater "minimum term" than the minimum parole eligibility period provided in section 3046. On the other hand, the minimum parole eligibility period provided in section 3046 could, under some circumstances, exceed the "minimum term" of 25 years under option two.[7]

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[7] Section 3064 states in relevant part that where two or more life sentences are ordered to run consecutively the defendant cannot be paroled until he or she has served the minimum parole eligibility period "on each of the life sentences." In multiple count cases under the "three strikes" law each count is to be calculated separately. (*People* v. *Cartwright* (1995) 39 Cal.App.4th 1123, 1143.) Therefore, where a third strike defendant is sentenced to consecutive indeterminate life terms the total of *all* the minimum parole

We conclude, therefore, that in choosing the "minimum term" of the indeterminate life term for a third strike offender under section 667, subdivision (e)(2)(A), in a case where the term otherwise provided for the current offense is a life sentence with possibility of parole but no minimum term is stated, the trial court should select between option two and option three, whichever produces the greater sentence.

D. Calculation of Defendant's Three Strike Sentence For Premeditated Attempted Murder.

In the present case, sentence must be imposed under section 667, subdivision (e)(2)(A), not section 664, because defendant has three prior serious or violent felony convictions. Because the current felonies were not committed on the same occasion and did not arise from the same operative facts (see discussion *supra*, pages 15-16), consecutive life sentences are mandatory. (§ 667, subd. (c)(6).) In determining the minimum term of the life sentence on count I, premeditated attempted murder, option one is inapplicable because "the term otherwise provided as punishment" for that offense is itself a life sentence (see discussion *supra*, page 20**)**; option three would result in a minimum term of 14 years (see discussion *supra*, page 21 and footnote 7); therefore the correct minimum term in the present case is 25 years under option two. Accordingly, defendant's sentence on count I, attempted premeditated murder, should be 25 years to life.

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eligibility periods which must be served under section 3046 constitutes the "minimum term" of each indeterminate life term for purposes of option three. For example, if a third strike defendant is sentenced to two consecutive indeterminate life terms the "minimum term" of each indeterminate life sentence under option three would be 14 years because the defendant would have a total minimum parole eligibility period of 14 years under section 3064. But, if the defendant was sentenced to four consecutive indeterminate life terms the "minimum term" of each indeterminate life sentence under option three would be 28 years because the defendant would have a total minimum parole eligibility period of 28 years under section 3064.

The People agree the proper sentence in this case is 25 years to life but they disagree with our method for reaching that result.

The People maintain option one should not be interpreted to mean that when "the term otherwise provided as punishment" is a straight life sentence the minimum term is three life sentences—a result which the People concede would be absurd. Rather, the People contend in such a case the minimum term of the indeterminate sentence under option one should be three times the minimum term of confinement under section 3046. This interpretation, the People argue, would be consistent with *Jefferson* because it would use the minimum term of confinement under section 3046 as the "minimum term" in sentencing both second strike and third strike offenders in straight life cases. Furthermore, although it would not affect the sentence in the present case, this interpretation would preserve option one as a sentencing option if, in the future, the Legislature should increase the minimum term of confinement before parole eligibility from 7 years to 9 or more years[8] or if some other section of the law requires a minimum term of confinement of 9 or more years before parole eligibility.[9]

Although there is a surface appeal to the People's argument, we cannot accept the People's interpretation of option one for two reasons.

First and foremost, it contradicts the Supreme Court's holding in *Jefferson* the Legislature did not intend to multiply the period of confinement under section 3046 for third strike offenders. The majority in *Jefferson* was challenged by the dissent to "'justify doubling the period set out in section 3046 for a second strike defendant when

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[8] Nine years tripled under option one would be 27 years which is more than the 25 years provided for under option two.

[9] For example, section 186.22, subdivision (b)(4) requires a minimum term of confinement of 15 years which, under option one would result in a sentence of 45 years to life. (See *Jefferson*, *supra*, 21 Cal.4th at pp. 90, 99, 102.)

the drafters left the same period unmultiplied for a third strike defendant[.]'"[10] (21 Cal.4th at pp. 99, 105.) The majority responded: "We see no inconsistency between the Legislature's decision to double the parole ineligibility period set by section 3046 for 'second strike' offenders *and its decision not to multiply that period for third strike offenders*." (*Id.* at p. 99; emphasis added.) Thus, contrary to the interpretation urged by the People in the present case, the *Jefferson* majority specifically rejected tripling the parole ineligibility period set by section 3046 to determine the minimum term under option one.

But what if the *Jefferson* majority's conclusion about the punishment of third strike offenders could be dismissed as mere dictum and we were to agree with the People the period set out in section 3046 could be tripled under option one? We would still be left with an absurd result because option one would call for tripling the minimum parole eligibility period under section 3046 while option three would call for using the same period *without* tripling it. If the Legislature had intended to triple the minimum parole eligibility period under option one it would not have included the same period, unmultiplied, in option three. The minimum term calculated under option one would always be greater than the minimum term calculated under option three.

For these reasons, we reiterate our conclusion. In third strike cases, where the term otherwise provided for the current offense is a straight life sentence with possibility of parole, the trial court should determine the minimum term by selecting either option two or option three, whichever produces the greater sentence.

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[10] The dissent is referring to option three which utilizes the terms provided by sections 1170, 190 or 3046 without multiplication. (§ 667, subd. (e)(2)(A)(iii).)

DISPOSITION

The judgment in case number BA143017 is modified to provide the sentence on count I is 25 years to life and the judgment is affirmed as modified. The order after judgment in case number A983129 is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

JOHNSON, Acting P.J.

We concur:

WOODS, J.

NEAL, J.